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12-VOLT MOTORCYCLE BATTERIES FROM TAIWAN

Views on Remand in
Investigation No.
731-TA-238 (Preliminary)

USITC PUBLICATION 2109

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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In 1985, the U.S. International Trade Commission made a determination in investigation No. 731-TA-238 (Preliminary) that there was no reasonable indication that an industry in the United States was materially injured, or threatened with material injury, or that the establishment of an industry in the United States was materially retarded, by reason of allegedly dumped imports of 12-volt motorcycle batteries from Taiwan (USITC Pub. No. 1654 (1985)). That determination was subsequently appealed to the U.S. Court of International Trade and remanded to the Commission for further consideration (Yuasa-General Battery Corp. v. United States, Ct. No. 85-04-00483, Slip Op. 87-60, May 22, 1987). The attached views were submitted to the Court in response to the remand.

VIEWS OF CHAIRMAN LIEBELER AND VICE CHAIRMAN BRUNSDALE

Our task in this remanded investigation is to revisit the record underlying the Commission's original determination in 1985, in order to reassess the issue of threat. [1/] Based on that record, we determine that there is no reasonable indication that the domestic industry producing 12-volt motorcycle batteries was threatened with material injury by reason of allegedly less that fair value (LTFV) imports from Taiwan. This decision follows a thorough consideration of the record compiled in the 1985 investigation. [2/] In light of the domestic industry's healthy condition and

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1/ Inv. No. 731-TA-238, 12-Volt Motorcycle Batteries from Taiwan, USITC Pub. No. 1654 (1985) (hereinafter 1985 determination), aff'd in part, remanded in part, sub nom. Yuasa-General Battery Corp., et al. v. United States, et al., Ct. No. 85-04-00483, Slip Op. 87-60 (Ct. Int'l Trade, May 22, 1987) (Aquilino, J.). In its decision, the Court affirmed the Commission's preliminary determination of no reasonable indication of material injury by reason of allegedly less than fair value (LTFV) imports in investigation No. 731-TA-228, 12-Volt Motorcycle Batteries from Taiwan, USITC Pub. No. 1654 (1985)(hereinafter 1985 determination). Howver, the Court ordered the Commission to reconsider its preliminary determination of no reasonable indication of threat of material injury by reason of allegedly LTFV imports in that investigation.

2/ Unlike the remand order in USX Corp. v. United States, ___ CIT ___, Slip Op. 87-14 (February 9, 1987), there is no indication in the Court's opinion that the Commission's needs to reopen the record in this case. Therefore, we have not conducted any further investigation or collected additional information for the record. We have, however, carefully examined the record, keeping in mind our obligation to approach the record with an open mind, uninfluenced by the Commission's prior determination on threat or the interest of the party prevailing upon judicial review. See USX Corp. v. United States, ___ CIT ___, Slip Op. 87-66 (June 1, 1987) at 11 (citations omitted).

We are also mindful of the standard for preliminary negative determinations recently affirmed by the Court of Appeals for the Federal Circuit. That standard allows the Commission to issue a preliminary negative determination only if "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed.Cir. 1986).

its generally improving performance, we conclude that it is likely to withstand competition from increased imports of 12-volt motorcycle batteries from Taiwan without imminent material injury. This finding is buttressed by the fact that in this, the Commission's second investigation of the industry [3/], the domestic industry had strengthened over 1982 and the likely injurious effect of future imports had decreased.

Like product, domestic industry, and the condition of the domestic industry

The Court has affirmed the Commission's original determination on these matters, so we do not need to to reexamine them. But in order to establish the context within which our present determination is made, we believe it is important to restate the Commission's original conclusions and its key finding on the condition of the industry. First, the like product was 12-volt motorcycle batteries. Second, the domestic industry was comprised of the two U.S. producers of 12-volt motorcycle batteries, petitioner Yuasa-General Battery Corporation (YGB) and Exide Corporation (Exide). Third, the domestic industry was healthy as a whole, despite temporary difficulties at Exide. In making its 1985 determination on the condition of the domestic industry, the Commission considered data covering the 1982-84 period and compared these data with those in the Confidential Report from its previous investigation of the industry. [4/]

Production of 12-volt motorcycle batteries declined slightly from 1982 to 1983, but in 1984 ended up above the 1982 level and also above the level

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3/ The Commission first investigated this industry in 1982 and determined that it was not suffering from material injury or threatened with material injury by reason of LTFV imports. Motorcycle Batteries from Taiwan, Inv. No. 731-TA-42 (Final), USITC Pub. No. 1228 (1982)(hereinafter 1982 determination).

4/ The 1982 determination covered the period from 1978 through September 1981.

achieved at any time during the Commission's first investigation. [5/] The improvement in 1984 occurred even though Exide suspended production in September 1984 (prior to recommencing production in a new location in January 1985).

Capacity was steady in 1982 and 1983, and declined in 1984 solely due to the closing of Exide's old plant. [6/] Capacity utilization declined marginally in 1983, increased substantially in 1984, [7/] and was higher throughout the period than it had been in 1980. [8/]

Domestic shipments increased during each year of the 1982-84 period. [9/] In addition, domestic producers' inventories declined each year, ending up 41 percent lower in 1984 than they had been in 1982. [10/] Average

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5/ 1985 determination at 7-8 & n.22. Because there are only two producers in the domestic industry, all the information concerning the condition of the industry is confidential, as is pricing information. Consequently, the Commission is unable to discuss the condition of the industry in specific terms, and must rely on generalizations and attempt to characterize trends without revealing confidential information.

6/ Report of the Commission accompanying the 1985 determination (hereinafter 1985 Report) at A-11. YGB's capacity was unchanged during the period of investigation, and virtually the same as in 1980. Compare 1985 Report at A-11 with Report of the Commission accompanying the 1982 determination (hereinafter 1982 Report) at A-18. All references to the 1982 and 1985 Reports are to the confidential versions thereof, for the Court's convenience. The 1982 Report is identified as document number 14 of List 2 of the Administrative Record, while the 1985 Report is identified as document number 12 of List 2. We note that YGB did not begin producing 12-volt motorcycle batteries until February 1979, and that the slight increase in capacity between 1979 and 1980 was probably accounted for by the commencement of full production. Exide's capacity declined somewhat between 1980 and 1982, but was higher in 1982 and 1983 than in 1978 and 1979. Id.

7/ 1985 Report at A-11.

8/ Compare id. with 1982 Report at A-18. Capacity utilization had declined during the period 1978-September 1981. Id.

9/ 1985 Report at A-12. Domestic shipments were greater each year during 1982-1984 than at any time during the previous investigation. Compare id. with 1982 Report at A-19.

10/ 1985 Report at A-13. Domestic producers' inventories increased during each year 1978-1980, and were greater in 1979 and 1980 than in 1982. Compare id. with 1982 Report at A-20.

employment and hours worked increased from 1982 to 1983, and declined somewhat in 1984 only because of the temporary shut-down of Exide. 11/

As for the financial indicators, one of the two firms performed well throughout the period 1982-1984. 12/ In 1984, its profits were significantly higher than in 1982, even though the ratio of net operating profits to sales was slightly below the 1983 mark. 13/ The other firm was experiencing difficulties, though not by reason of allegedly LTFV imports from Taiwan, 14/ and its financial performance improved in 1984. 15/

Based on its analysis of the record, the Commission concluded in 1985 that there was no reasonable indication of material injury to the domestic industry and that, even if there had been, there was no reasonable indication that any such injury would have been by reason of allegedly LTFV imports. That determination was affirmed by the Court, and is not at issue here. It is

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11/ 1985 Report at A-14. Employment and hours worked at YGB continued to increase in 1984. Id. Employment in 1982 was greater than at any time during 1978-September 1981, and hours worked in 1982 were greater than 1978 and 1980-September 1981. Compare id. with 1982 Report at A-23.

12/ Because the two companies used different accounting years, it was impossible to aggregate their data so that they could be discussed at least in general terms.

13/ 1985 Report at A-16. In comparison with the period 1978-September 1981, this firm's financial performance appeared significantly better in 1984 than during the period covered by the 1982 determination. Compare id. with 1982 Report at A-26.

14/ 1985 determination at 10; 1985 Report at A-20.

15/ 1985 Report at A-16. A full comparison with data for the period 1978-September 1981 is not possible because of a change in accounting years in January 1983. However, the firm's performance in 1982 was poorer than during 1978-1980. Compare id. with 1982 Report at A-26.

against this background that we conduct our examination of the issue of reasonable indication of threat of material injury. 16/

No reasonable indication of threat of material injury

Section 1677(7)(F) directs the Commission to determine whether a U.S. industry is threatened with material injury "on the basis of evidence that the threat of material injury is real and that actual injury is imminent." 17/ In making its determination, the Commission is further directed to consider eight specific factors "among other relevant economic factors." 18/ They are:

> (I) if a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement),

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16/ In the Commission decision following the remand of Cold-Rolled Steel Plates and Sheets from Argentina, Vice Chairman Brunsdale discussed the threat of injury in remanded title VII cases and the issue of mootness. See Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv.No. 731-TA-175 (Final), USITC Pub. No. 1967 (1987) at 35-43. The problem arises in cases that call on the Commission to assess on remand whether the facts gathered years before show that a domestic industry was then threatened with material injury. In the Argentina case, Vice Chairman Brunsdale found the issue of threat to be moot because, as a result of Petitioner's delay, two years had elapsed between the time of the Commission's decision and the Court's ruling. She stated that, if because of the passage of time, "the actual facts can be known with certainty, to ignore those facts in favor of a prediction of what might have happened, based on facts occurring at some other time, flies in the face of the congressional mandate that our decisions be made on the basis of evidence and not on the basis of conjecture or supposition." Id. at 39-40.

Vice Chairman Brunsdale does not believe that the threat of injury in the present case should be dismissed on the grounds of mootness because petitioners here did not delay action in the Court of International Trade, as did the petitioners in the Argentina case. It would be patently unfair to hold Petitioners responsible for delay that is beyond their control.

17/ 19 U.S.C. § 1677(7)(F)(ii).

18/ 19 U.S.C. § 1677(7)(F)(i).

(II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States, 19/

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury, and

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 1671 or 1673 of this title or to final orders under section 1671e or 1673e of this title, are also used to produce the merchandise under investigation. 20/

The Court remanded this investigation partly on the ground that the Commission did not, in its 1985 opinion, consider each of the above factors. While we do not think that the Yuasa-General Battery decision would require the Commission in all investigations to demonstrate its thorough consideration of the record by separately and specifically discussing each statutory factor, whether relevant or not, we do so in this case.

19/ The Commission's regulations provide that it shall consider in particular "the availability of other export markets" in making its determination. 19 C.F.R. § 207.26(d)(3) (1986).

20/ 19 U.S.C. § 1677(7)(F)(i)(I)-(VIII).

Nature of the subsidy. Since this is an antidumping duty investigation, this factor is not relevant.

Increase in production capacity or existing unused capacity. Information concerning Taiwanese production capacity and capacity utilization rates was provided to the Commission by the Taiwanese Electric Appliance Manufacturers Association (TEAMA) through the U.S. Department of State. Taiwanese productive capacity was 1.6 million units in 1980 [21/], 1.6 million in 1982, 1.7 million in 1983, and 2.1 million in 1984. [22/] At least a portion of the large increase between 1983 and 1984 is attributable to improved reporting, which makes the numbers difficult to compare directly. Of the seven firms providing production capacity data in 1984, two did not provide data on their production capacity in 1982 and 1983. [23/] If these firms are excluded from the statistics, Taiwanese productive capacity increased only 3.63 percent between 1983 and 1984. Capacity utilization moved unevenly over the period, rising from 55.8 percent in 1982 to 65.9 percent in 1983, and then falling to 60.3 percent in 1984. [24/] Neither the modest gain in total productive capacity nor the relatively steady percentage of capacity utilization rate provide sufficient indication of threat of material injury.

21/ 1982 Report at A-52.

22/ Public version of 1985 Report at A-17. There is an error in computation of the table in which this information appears. The corrected figures in our opinion are based on the original source of the information, a State Department cable, unclassified but business confidential, which was before the Commission at the time of its 1985 determination, and the Court on review. The cable appears as Document No. 13 of List 2 of the Administrative Record.

23/ 1985 Determination at 12 n.48.; Public version of 1985 Report at A-17. The two companies which did not provide capacity data for 1982 and 1983 were not new entrants to the industry in Taiwan, however, as both reported production of 12-volt motorcycle batteries in 1982 and 1983.

24/ Capacity utilization in 1984 for the five remaining companies was 71.1 percent.

Rapid increase in market penetration. Imports from Taiwan increased from 257,000 units (estimated) in 1982 to 620,000 units in 1984 [25], a 141 percent increase. [26] However, such imports had been as high as 416,600 units in 1980. [27] U.S. consumption grew considerably over the period, [28] and the capacity of U.S. producers dropped only slightly. [29] The percentage increase in Taiwanese imports was admittedly large. However, because of the expanding domestic market, the market share increase of

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25/ 1985 Report at A-26. The figure for 1982 is estimated based on the available partial year data for April to December. Prior to April 1, 1982, all lead-acid storage batteries were classified under a single TSUS item. A separate TSUS item for 12-volt lead acid storage batteries, i.e. the batteries under investigation here, was established by Executive Order 12354, effective March 31, 1982, as a result of a petition filed with the Office of the U.S. Trade Representative by petitioner YGB. 1985 Report at A-5. The United States is clearly the major market for exports of 12-volt motorcycle batteries from Taiwan. The Commission noted in its 1985 determination that exports to the United States have accounted for a "relatively stable percentage of Taiwanese production." 1985 determination at 12. As the Court correctly pointed out, Slip Op. 87-60 at 14, this is only accurate when measured against the increase in Taiwanese production, from 1,030,000 units in 1982 to 1,285,000 units in 1984. However, in considering the likelihood that there will be an increase in imports which is likely to cause imminent material injury, whether an increasing portion of exports is being sent to the United States is relevant. In this investigation, the increase in exports to the United States, 18 percent, was actually less than the increase in Taiwanese production, 24.8 percent, supporting the conclusion that Taiwanese production is not increasingly directed at the U.S. market.

26/ We assume that the reference to a 241 percent increase in the Court's opinion, Slip Op. 87-60 at 13, is a typographical error.

27/ 1982 Report at A-39. The substantial drop in imports between 1980 and 1982 may be accounted for by the removal of 12-volt motorcycle batteries from Taiwan from the list of products eligible for duty-free treatment under the Generalized System of Preferences, based on a request by petitioner YGB. 1985 Report at A-5. See Exec. Order No. 12,354, 3 C.F.R. 140 (1982 Compilation).

28/ 1985 Report at A-10. Apparent consumption was higher in 1982 than in 1978 and 1980, and only marginally less than in 1979. Compare id. with 1982 Report at A-10.

29/ 1985 Report at A-11. See note 6, supra.

Taiwanese imports was moderate. 30/ In addition, U.S. producers were relatively healthy and appear not to have been affected by the increase in imports. Thus, the increase in market penetration was not that rapid, given the expanding domestic market, and was not sufficient to indicate a threat of material injury in this case.

Probable price effects of future imports. The Commission collected price information from importers and domestic producers for two popular models of 12-volt motorcycle batteries, or their equivalents, for 1983 and 1984. While this information is confidential, some general discussion of prices is possible. Prices for both battery models generally declined during 1983 and 1984. In 1983, importers' prices and domestic producers' prices were roughly comparable, 31/ and importers' prices were higher than domestic producers' prices in four of the eight comparisons. In 1984, importers' prices declined more rapidly than domestic producer's prices, as noted by the Court. 32/ However, a closer examination of actual price levels indicates that importers' prices for one model actually increased during 1984 to a level above that reported in fourth quarter 1983, while importers' prices for the other model increased during the first three quarters of 1984 before falling in the fourth

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30/ The domestic industry accounted for a portion of these imports, increasing its imports during 1982-1984, by 81 percent. Evidently, since the domestic industry's imports increased by a smaller percentage, from a smaller base, than did imports from Taiwan overall, the domestic industry's share of imports from Taiwan decreased between 1982 and 1984. While we do not exclude such "captive" imports from our analysis, we nonetheless consider them significant in evaluating whether imports are likely to increase to injurious levels. Our reasoning is that increases in captive imports are far less likely to threaten material injury than increases in non-captive imports. To be more specific, domestic firms obviously choose to import when it is in their best interest to do so

31/ 1985 Report at A-29

32/ Slip Op. 87-60 at 15.

quarter to a level slightly above the first quarter 1984 level. 33/ In our opinion, it is not probable that the imports could have had a significant price depressing or suppressing effect on U.S. prices in the near future that would have resulted in material injury.

Increase in inventories. The statute does not specify whether importer or domestic producer inventories are to be considered. Although the relevance of the former is apparent, increases in domestic producer inventories might also indicate threat of material injury, if the increases result from a continuing inability to sell in the domestic market caused by imports. Importers' inventories increased during the 1982-84 period, but even at their peak were only 15.4 percent of the 1980 level. 34/ Thus, while this absolute increase was significant, we are convinced that, in the case of this industry, such an increase would not indicate a real threat of imminent material injury. 35/ Domestic producers' inventories decreased during the

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33/ 1985 Report at A-30-31. We do not believe that underselling evidence is persuasive in this case. The Commission's investigation indicated that a number of factors were responsible for differences in prices and alleged lost sales. See 1985 Report at A-33-34.

34/ Compare 1985 Report at A-24 with 1982 Report at A-51. Importers' inventories had increased significantly between 1978 and 1980. 1982 Report at A-51.

35/ The Court noted that the Commission's opinion referred both to increases in importers' inventories and inventories as a share of shipments, which declined each year during the period under investigation. Slip op. 87-60 at 13. The Court noted that only the former is specifically referred to in the statute, and the latter is not necessarily supportive of a negative determination. Id. We also note that importers' inventories as a share of their shipments increased between 1978 and 1980, and were substantially higher in 1980 than in 1982. Compare 1982 Report at A-51 with 1985 Report at A-24. We find that the decline in inventories as a share of importers' shipments indicates that importers are not stockpiling product which might later flood the market and cause material injury to the domestic industry. Moreover, the fact that importers' inventories as a share of their shipments are declining suggests that the market is absorbing the increased imports. Therefore, while this factor is not specified in the statute, we consider it a "relevant economic factor" to be included in our analysis.

1982-84 period, [36/] continuing a decline that began in 1980 (which represented a peak over the preceding two years). [37/] Again, these data support the conclusion that the U.S. market was expanding rapidly enough to absorb the increases in both domestic production and imports.

Presence of underutilized capacity in the exporting country. This factor is considered in our earlier discussion of productive capacity and existing unused capacity.

Any other demonstrable adverse trends. In spite of careful review of the record, we have not found any other adverse factors bearing on the issue of reasonable indication of threat of material injury in this investigation. To the extent that the Court's discussion of Exide's "difficulties" [38/] may be considered an adverse trend, we note the Commission's 1985 conclusion to the effect that Exide's difficulties did not constitute a reasonable indication of material injury to the domestic industry, and were not by reason of imports. This conclusion was affirmed by the Court. [39/] Exide resumed production in January 1985, after the Commission's period of investigation ended. While it is true that Exide's performance might that suggest that Exide was more vulnerable to competition from imports than was YGB, a threat determination must be based on the evaluation of the likely impact of future imports on the industry as a whole, and not on any single producer. Moreover, Exide's performance improved during 1984, and nothing on the record suggests that that improvement should not have been expected to continue in the firms's new facility.

36/ 1985 Report at A-13.
37/ Compare id. with 1982 Report at A-20-A-22.
38/ Slip Op. 87-60 at 16
39/ Slip Op. 87-60 at 8-9.

Potential for product shifting. There were no on-going investigations or outstanding antidumping or countervailing duty orders on products imported from Taiwan that were likely to result in a shift of production from such products into production of 12-volt motorcycle batteries. Consequently, this factor is not relevant to our analysis.

Conclusion

We find there is no clear and convincing evidence in the record that would reasonably indicate a threat of imminent material injury to the domestic industry by reason of allegedly LTFV imports of 12-volt motorcycle batteries. Nor is there any likelihood that further investigation would have led us to evidence establishing such a threat. The available evidence on the eight factors listed in section 1677(7)(F)(i)(I)-(VIII) was more than sufficient to allow us to conduct a thorough examination of each. We do not believe that the American Lamb Court intended that the Commission decline to make negative preliminary determinations for the sole purpose of collecting additional and more recent data. Therefore, we are confident that our careful examination of all available data in this case meets the standard for preliminary negative determinations affirmed in American Lamb and produced a decision consistent with the intent of the statute.

SEPARATE VIEWS OF COMMISSIONER DAVID B. ROHR

12 Volt Motorcycle Batteries from Taiwan
Inv. 731-TA-238(P)(Remand)

This remanded preliminary investigation was conducted by the Commission pursuant to the order of Judge Aquilino of the Court of International Trade in *Yuasa-General Battery Corp. et al. v. USITC et al.*, Ct. No. 85-04-00483, Slip Op. 87-60 (Ct. Int'l Trade May 22 1987). That case was an appeal of the Commission's unanimous negative preliminary determination in *12-Volt Motorcycle Batteries from Taiwan*, Inv. No. 731-TA-238(P), USITC Pub. No. 1654 (1985). The judge's order remanded the investigation to the Commission specifically "for reconsideration of the issue of whether there is a reasonable indication that the 12-volt motorcycle battery industry in the United States is threatened with material injury by reason of imports from Taiwan." Having considered the record of this remanded investigation and the order and opinion of the Court of International Trade, I conclude that there is no reasonable indication of a threat of material injury, within the meaning of the statute, to the domestic 12-volt motorcycle battery industry by reason of imports from Taiwan.

Preliminary Issues

Before turning to the factual basis for my decision, two preliminary matters must be disposed of. First, in this remand investigation, unlike the investigation conducted pursuant to the remand order of the court in the *USX* matter, 1 the Commission did not seek to supplement the record of its original investigation. I believe this to be

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1 *See* Cold Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175(Final)(Remand), USITC Pub. 1967 (March 1987), *on remand pursuant to* USX Corp. v. United States, Ct. No 85-03-00325, Slip Op. 87-14 (Ct. Int'l Trade February 9, 1987), Views of Commissioner David B. Rohr at 56.

appropriate in light of the findings and order of Judge Aquilino, which concerned the adequacy of the Commission's decision and reasoning rather than the adequacy of the Commission's investigation.

The second matter which must be discussed is the standard which is to be applied in this investigation to determine whether the imports "threaten" the domestic industry with "material injury." It is well established that material injury to a domestic industry is "harm which is not inconsequential, immaterial, or unimportant." 2 It follows that the injury with which the industry is threatened must be not inconsequential, immaterial or unimportant. It is further clear that the actual "material injury" with which the industry is threatened must be "imminent" and that threat must be "real." 3

Judge Aquilino held that the Commission, in making its determinations with respect to threat, must consider, and apparently must discuss in its views, all of the factors set forth in Section 771(7)(F). I have done so in this investigation. In past views dealing with "threat" I have often specifically enumerated my views on each of the Section 771(7)(F) factors, even to the point of explaining why I did not view particular factors as relevant given the particular facts of the case before me. 4

In these past cases, I have outlined the process which I use in considering threat issues. I have stated that, in my view, the Section 771(7)(F) factors relate to two basic considerations, the capabilities and the intentions of foreign exporters with respect to the U.S. market. I have also indicated that to make a decision with respect to threat it is

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2 19 USC 1677(7)(A).

3 19 USC 1677(7)(F)(ii).

4 *See, e.g.*, Certain Carbon Steel Pipes and Tubes from Turkey and Thailand, Inv. Nos. 701-TA- 253(F) and 731-TA-252(F), USITC Pub. 1810 (February 1986), Views of Commissioners Seeley G. Lodwick and David B. Rohr Concerning Threat of Material Injury by Reason of Imports of Standard Welded Carbon Steel Pipes and Tubes from Turkey at 23-30.

necessary to evaluate these factors in light of the condition of the domestic industry, its "vulnerability." 5 Such considerations are an important part of my analysis of threat. The Section 771(7)(F) considerations allow me to draw conclusions about what is likely to happen with respect to the volume and price of future imports. The potential impact of such future imports on the industry, i.e., whether the threat they pose is " real" and the actual, material injury "imminent," is a judgment I can make only in the context of a detailed examination of the actual strengths and weaknesses of the domestic industry.

Finally, because this remand involves a preliminary investigation, the standard under which I evaluate the information is whether the information raises a reasonable indication of such a threat, not whether the threat actually exists. 6 This standard was recently elaborated by the Court of Appeals for the Federal Circuit in the *American Lamb* decision. 7 Under this standard, if I find that there is clear and convincing evidence that imports do not pose a real and imminent threat of actual material injury, and conclude that there is no liklinood that the information to be obtained in a final investigation would change that conclusion, I must make a negative determination. My determination herein is made in light of these standards.

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5 *Id.* at 23.

6 19 USC 1673b.

7 American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1985). American Lamb specifically rejected the notion that an affirmative determination is required whenever the evidence raises a "possibility" of injury When this standard is read together with the decision of the Court of International Trade in Budd Co. v. United States, 1 CIT 175 (1981), requiring the Commission to conduct a thorough investigation, I believe it does not require an affirmative determination merely because one possible interpretation of the data supports an affirmative determination, if, after the thorough investigation, that interpretation of the data is not appropriate. *See* Certain Unfinished Mirrors from Belgium, the Federal Republic of Germany, Italy, Japan, Portugal, Turkey, and the United Kingdom, Inv. Nos. 701-TA-273(P) and 731-TA-320 through 325(P), USITC Pub. 1850 (May 1986), Views of Commissioner David B. Rohr at 19-29.

The Section 771(7)(F)(i) Factors - The Future Imports

As directed by the Court, my analysis begins with the Section 771(7)(F)(i) factors, which I use to evaluate what is likely to happen with respect to future imports. As Judge Aquilino noted, the first statutorily enumerated factor, Section 771(7)(F)(i)(I) relates to the nature of a subsidy and is not relevant to this investigation, which involves dumping. 8

The second factor relates to foreign capacity, specifically either: (a) an increase in production capacity or (b) existing unused capacity - in the exporting country, with the additional caveat that either (a) or (b) must also be found "likely to result in a significant increase in imports of the merchandise into the United States." 9 In considering data relating to capacity, it has been the experience of the Commission that any capacity number, be it for a domestic or foreign industry, is "soft." It reflects what the individual supplying the information "feels" is practicable for his plant, often based on a less than perfect understanding of what the Commission has asked for.

Looking at the numbers given to the Commission, one table, noted by the Court, shows an increase in Taiwan production capacity from approximately 1510 thousand units to 2130 thousand units, an increase of 41 percent. 10 This number is deceiving, however, as well as miscalculated. It includes, in the 1984 data, two companies, which, although producers in all three years did not report capacity for the first two years. The change between years is therefore overstated. Further, the numbers provided for capacity in the final year by these two companies are questionable. In one case, reported capacity was less than half of actual

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8 Slip. Op. 87-60 at 11 n.11.

9 19 USC 1677(7)(F)(i)(II).

10 Slip Op. 87-60 at 14 (noting Table 9 of the Commission's Report). It is also incorrectly computed. The correct capacity figures should be 1560 thousand for 1982, 1650 thousand for 1983 and 2130 thousand for 1984.. The State Department cable, unclassified but business confidential, which formed the basis for this table was part of the record before the Commission and the Court. Document 13 of List 2 of the Administrative Record.

reported production for the company. In the other, the reported capacity, if true, would reflect a capacity utilization rate of less than 4 percent. It should also be noted that these two companies produced small quantities of the product throughout the investigation, but that their reported capacities significantly distort the picture of the industry's 1984 capacity. 11 Because these two producers are small, it is my judgment that the picture of Taiwan capacity is not compromised by the exclusion of their data.

Capacity data for the five companies that did provide data for all three years show an increase, 1982-84, from 1560 thousand units to 1710 thousand units, a 9.6 percent increase. Looking more closely at the numbers, I find that of the five companies, three show no increase in capacity over the period. The other two companies did report increases in production capacity. One of these producers was the Taiwan producer with the least capacity throughout the period.

The other producer, which reported the largest increase in capacity, was ***

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*** I do not believe that it is likely that its capacity threatens the domestic industry. 12 I therefore conclude it would be appropriate to discount this capacity when considering the capacity of Taiwan producers that could reasonably be said to pose a threat to the domestic industry.

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11 These two producers accounted in 1982, 1983 and 1984 for*** percent,*** percent, and*** percent of Taiwan production, their production declining both absolutely and relatively. In 1984, the only year for which they provided capacity figures, their capacity would have accounted for almost*** percent of total reported Taiwan capacity.

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Taking these facts into consideration, the increase in capacity which could arguably be said to pose a threat to the domestic industry would be the increase in capacity of the other four producers. The data for these four producers, *** of whom did not increase their capacity, reveal an increase in capacity 1982-1984 from 1000 thousand units to 1060 thousand units, a six percent increase.

Section 771(7)(F)(i)(II) also refers to "existing unused capacity." The original report shows capacity utilization fluctuating from approximately 58 percent to 64 percent to 60 percent. 13 Using the four producer assumption outlined above, capacity utilization increased from 46 percent to 50 percent to 60 percent. While this trend in capacity utilization is different from that in Table 9 (or as recalculated), both reveal an industry that has existing unused capacity available to increase exports to the United States. I conclude that these statistics do provide a "reasonable indication" that Taiwan producers have available capacity which could be used to significantly increase imports into the United States.

The third statutory factor, Section 771(7)(F)(i)(III), relates to market penetration, specifically comprising two elements: (a) a rapid rise in import penetration; and (b) the likelihood that the penetration will increase to injurious levels. 14 First, we must look at the numbers themselves. Using import statistics from the Census Bureau and apparent consumption figures calculated by the Commission, import penetration of overall Taiwan imports increased from *** percent of the market to *** percent. 15

As with the capacity figures, however, I cannot blind myself to other information on the record. First, I cannot view as potentially injurious imports made by the domestic industry

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13 Recalculating these percentages based on the original cable the capacity utilization rates are 66 percent, 72 percent, and 60 percent.

14 19 USC 1677(7)(F)(i)(III).

15 *See* Table II on A-28.

itself. Adjusted to exclude their imports, the import penetration ranges from *** percent to *** percent. 16 This lowers the absolute import penetration level, but actually increases the rate at which import penetration increased.

One other factor needs to be considered before drawing any conclusion with respect to market penetration. There is no question that it is reasonable for the Commission to rely on Census data on imports. Such data are usually more reliable than most other sources of data about the volume of imports. Census statistics are not, however, the only source of data on imports, and the Comission has often noted problems than can arise in its use. One such problem is timing, Census data being reported based on the processing of the entry documents. Problems arise when the particular commodity being shipped tends to be imported in a small number of large shipments. Such surges have often been seen to distort interim data.

It can also have an effect on annual data. In this investigation, for example, if one looks at the imports reported over a three year period by Census and exports reported by the Taiwan producers, the total numbers are remarkably close. However, the Taiwan figures are reported based on the time the goods were exported and reflect only a small increase in volume to the United States each year. 17 When import penetration is figured on this basis, rather than increasing from *** to *** percent, import penetration actually drops from *** percent to *** percent, and when the imports by the domestic producers are factored out the resulting import penetration figures are *** percent, *** percent, and *** percent. 18

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16 *See* unnumbered Table on A-28.

17 Specifically they reveal a larger number of units shipped in 1982 and a smaller number shipped in 1984.

18 It must be conceded that *a priori* the date on which Customs processes entry documents has no greater or lesser relationship to when the imports injure the industry than does the date on which they are shipped from the foreign factory. The Commission has recognized that injury can result to a domestic injury well in advance of the time the goods are physically imported. *See* Offshore Platform Jackets and Piles from the Republic of Korea and Japan, Inv. Nos. 701-TA-248(P) and 731-TA-259 and 260(P), USITC Pub. 1708 at 4 (June 1985).

It must also be noted that the two elements of Section 771(7)(F)(i)(III) are written conjunctively. Not only must I consider whether the import penetration is increasing rapidly, but also whether the import penetration will increase to an injurious level. The question of what is an "injurious level" is a most difficult part of any analysis of threat. For some industries very small volumes of imports and import penetration can be injurious. For others, quite significant levels would not be injurious. The same level of imports might be injurious or not depending upon whether the condition of the industry is improving or deteriorating. Consideration of this factor is inextricably linked to a discussion of the condition of the industry. I will discuss below my conclusions as to the condition of the industry and how they factor into my analysis of the impact of the potential imports.

One consideration, however, that must be discussed at this point, in order to put the issue of an injurious level of imports into perspective, is the history of import penetration in this market. As noted above, import penetration in the period 1982-1984 was in the *** , increasing or decreasing depending upon the basis on which it is calculated. From the Commission's prior 1982 investigation, import penetration ratios were developed for the years 1978-1980, with interim figures for 1980 and 1981. For that period, Taiwan imports obtained respectively *** percent, *** percent, and *** percent of the domestic market with interim shares for 1980 and 1981 of *** percent and *** percent of the market. In that investigation the Commission made a negative determination. 19 The fact that, although increasing, the current market shares are well below these levels is, of course, not determinative, but is relevant to what one can reasonably infer about the injuriousness of various import levels.

The fourth factor at which the statute directs attention is the probability that the

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19 Of course, import penetration ratios were only one of many factors that were considered when the Commission made that negative determination.

imports will have a price depressing or suppressing effect. 20 The starting point for this consideration is whether the imports were having a price depressive or suppressive effect at the time the decision was made. This analysis is generally contained in the Commission's causation analysis with respect to present material injury.

In this case, the Commission collected price data by quarters for 1983 and 1984 for the two principal models of motorcycle batteries sold by the various companies in the U.S. market. This data showed roughly comparable prices for 1983 and underselling in 1984. 21 A description of this conclusion in the Commission's views was immediately followed by the statement that the Commission's investigation did not reveal a pattern of sales lost to the domestic industry on the basis of price. These two statements should be considered together and reflect the conclusion that, although there was underselling, the imports were not at the time having a price depressive or suppressive effect.

Looking at the data afresh, this conclusion appears to be justified. The price trends were different for the two companies who comprised the domestic industry. For the smaller of the two, its prices were significantly *** than the imports, but its prices reveal no downward trend. For the other, prices did fluctuate downward, but it undersold the imports more often than not. Further, the most significant drop in this company's prices occurred while the import price was rising and resulted in underselling by the company of $ *** by the end of 1984. While the fact of underselling supports the possibility that there was a price suppressive or depressive effect, the pattern of changes in that underselling does not.

I then look at the anecdotal evidence compiled during the lost sales investigation to see what support it may give to the existence of any price effect on the part of the imports.

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20 19 USC 1677(7)(F)(i)(IV).

21 To be more precise, there were small levels of underselling and/or overselling for the two models in 1983, and fairly significant underselling in the first two quarters of 1984, which declined in the last two quarters of that year.

The company that was consistently undersold by the imports offered no examples of instances in which it lost sales or revenues to the imports. For the other company, price was mentioned as one of several factors in the lost sales, but no consistent pattern was revealed.

The conclusion which I draw from this is that there is likely to continue to be underselling by imports of the *domestic industry's* prices. However, the evidence is also that this underselling is not likely to have a significant price depressive or suppressive effect. 22

The fifth factor, Section 771(7)(F)(i)(V), relates to increases in inventories. 23 The Commission has traditionally interpreted this factor to relate to inventories of imports. 24 It must be noted that the statute refers to "inventories." It does not refer to the "volume of inventories", the "value of inventories", or the "ratio of inventories to shipments". I find no indication that Congress intended the Commission to use any one of these measures (or any other particular measure) of the significance of inventories to the exclusion of any other. There are times when any of these measures of inventory may be particularly significant.

In point of fact, for businesses, the ratio of inventory to shipments is frequently most significant because businesses often plan inventories based on shipments. Where consumption and shipments are increasing, the ratio is a good indication of whether inventories are changing according to general business conditions or whether imports are being built up so as

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22 The Commission's conclusion as to the lack of a current price depressive or suppressive effect was not disturbed by the Court. There is no evidence in the record which would indicate how or why imports which are not currently having a price depressive or suppressive effect will develop such an effect in the future.

23 19 USC 1677(7)(i)(V).

24 I do not mean to imply that changes in domestic inventories would not also be relevant to threat. A consideration of such domestic inventories is factored into my threat analysis in the context of the condition of the domestic industry.

to "assault" the domestic industry. I therefore adopt the conclusions with respect to inventories contained in the original Commission views, i.e., that inventories relative to shipments were relatively stable and do not support an affirmative finding of threat.

The next factor listed in the statute is Section 771(7)(F)(i)(VI), the presence of underutilized capacity in the importing country. 25 My conclusions with respect to underutilized capacity are contained above. 26

Section 771(7)(F)(i)(VII) relates to other demonstrable adverse trends that indicate a "probability" that the imports will be a cause of actual injury. 27 Whether or not this factor also allows the Commission to consider those trends which lead toward a conclusion of no threat of injury, it is clear that there are no demonstrable adverse trends which indicate a probability that future imports will be a cause of injury.

Finally, Section 771(7)(F)(i)(VIII) relates to the possibility of product shifting. This section only comes into play if there are two products under current investigation, or a recent investigation that resulted in an outstanding order. In this investigation there is only one product under investigation, and there are no outstanding orders on products whose productive capacity might be shifted to the production of 12-volt motorcycle batteries.

Based upon an analysis of these Section 771(7)(F)(i) considerations, I am able to draw a *partial* conclusion with respect to threat. A complete conclusion must await the discussion below of the condition of the industry. However, because of the Court's order, I

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25 19 USC 1677(7)(F)(i)(VI).

26 Note my discussion of capacity utilization in connection with "existing unused capacity" in the context of Section 771(7)(F)(i)(II).

27 19 USC 1677(7)(F)(i)(VII). In his opinion, Judge Aquilino suggests that the poor operating performance of one of the two domestic producers, Exide, may be an "other demonstrable adverse trend." Slip Op. 87-60 at 16. I believe it is more appropriate to treat the performance of Exide in the context of the condition of the domestic industry and have done so below. Alternatively, one could find that the entire discussion of the condition of the domestic industry could be factored into the threat analysis within the context of "other demonstrable adverse trends." Wherever one feels it is most appropriate to consider such factors, it is clear that they are an important consideration.

believe it would be appropriate to summarize the partial conclusion which can be drawn from the Section 771(7)(F)(i) factors.

First, I believe that one could reasonably conclude that there is no reasonable indication that a significant increase in imports with any significant price depressive or suppressive effect on the domestic market is unlikely. One could choose to view as most appropriate those statistics which show only a minor increase in capacity, a decreasing import penetration ratio, no adverse inventory buildup, no price depressive effect and no other demonstrable adverse trends. Such data is just as objective and reasonable as that which lead to the opposite conclusion. My judgment as a Commissioner, however, is that both sets of data tell only a part of the whole story of this industry. I conclude that there is a reasonable indication of a significant amount of capacity in Taiwan available to continue to increase imports, that imports and import penetration ratios will continue to increase, that there will be some, relatively small, adverse price effects, that there is no indication that there will be, in the short run, a significant change in the pattern, volume or price, of the imports, that import inventories are not a substantial problem, and there are no other demonstrable adverse trends.

The Section 771(7)(F)(ii) Factors - The Condition of the Industry

Future imports are thus likely to have an adverse effect on the industry. However, the ultimate conclusion that the statute requires me to make is not whether there is a reasonable indication that future imports will have an adverse effect on the industry. It is whether that adverse effect will be a cause in a decline in the condition of the industry to the point where it is actually experiencing material injury within a time frame that is "imminent." To reach that conclusion, one must understand the condition of the domestic industry.

First, it must be admitted that the Commission did not, in its original views, elaborate its conclusions about the the condition of the industry in the course of its threat

analysis. It must also be noted that Judge Aquilino did not discuss these conclusions at any great length in his opinion. 28 The Commission's discussion implicitly incorporated its basic findings with respect to the condition of the industry. We concluded that, in light of the overall condition of the industry and the the fact that it was improving rather than deteriorating (keeping in mind that this improvement occurred during a period in which the imports had been increasing in volume), there was no reasonable indication that the imports would threaten the industry in a real manner in any time frame that could reasonably be viewed as imminent.

What then is the condition of the domestic industry that formed the basis for this judgment? It was discussed at length in our original views in the course of our discussion of present injury. This analysis was not remanded to us for reconsideration and thus must form the starting point for the current discussion. There are two preliminary points which must be made with respect to this discussion, both arising out of the fact that the industry is composed of only two producers. The first is that where the industry is limited to two producers virtually all information is confidential. 29 Each company may be presumed to know its own data. Simple subtraction would allow it to discover the confidential information of the other. Because the Commission tries not to have its opinions confidential, our written views were therefore rather opaque.

The second problem caused by the fact that there were only two producers is even more important to our decision. The Commission's mandate is to consider the condition of an

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28 Nonetheless, it was a key element in the original decision of the Commission. The Commission recognized that the current trends in imports (based on the Section 771(7)(F)(i) factors) were likely to continue and would have an adverse effect on the industry.

29 In the Court review of our decision, it was apparent that some confusion was created by the Commission's use of particular adjectival descriptions of various statistics, the use of which was required because any more specific characterization would have revealed confidential data. To avoid what I believe was a substantial cause of controversy with respect to those views, I have chosen, in this remand opinion, to utilize the confidential data. As a result the views themselves are confidential and the public version, with such data deleted, much less helpful to the public. In the circumstances, this is unavoidable.

"industry," not individual companies. 30 Where there are many companies in an industry, aggregation tends to level out distortions in the individual company data and provide a reasonably accurate picture of the industry as a whole. With only two companies, and two companies of different size and different operational trends, such distortions are not leveled out mathematically. Aggregation to develop a picture of an "industry" becomes more a matter of judgment that mathematics.

In this investigation, with respect to the production related indicators, we see an industry facing steadily rising consumption. Shipments rose for the industry as a whole,

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These basic patterns were repeated for the production indicators as a whole, as well as for the employment indicators.

The financial indicators present a slightly different problem.

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. Again this data is not directly comparable to any other data the

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30 Cf. Atlantic Sugar, Ltd. v. United States, 2 CIT 295, 300-301 (1981) and 553 F. Supp. 1055, 1059-60 (1982). Obviously, an industry is composed of individual companies and any consideration of the condition of the industry starts on an individual company basis. Although as Judge Watson noted, where there are many companies in an industry, individual consideration of each presents insurmountable administrative problems, where, as here, there are only two an examination of each is possible. Even where this is done however, it remains an exercise in judgment as to the characterization of the "industry".

Commission possesses. 31

How then is the financial condition of the industry to be evaluated? Certain other factors must also come into play. The smaller company's financial, and, in fact, all its operational data, is colored by the fact that it was closing certain older, less efficient operations in favor of new facilities. 32

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. Even here, as well, it is impossible to ignore that there were signs of improvement in the most recent financial data.

Therefore, the data can be summarized as follows. One company's data reflects *** improving results over the period of the investigation during which imports were increasing. The other company's data reveal *** so many caveats as to be highly questionable as an indication of what is actually happening. Of course, production indicators will be down when moving to entirely new facilities, which have not yet been placed on stream. So too, financial and employment indicators must reflect that change. I cannot conclude that they are symptomatic of negative operating conditions in the industry as a whole.

In light of the overall positive operating conditions in the industry, and in light of the improvement they have shown over the period of investigation, I cannot conclude that even the adverse effects that the trends in imports presage for the future can reasonably be said to indicate a real and imminent threat of material injury.

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31 It may be argued that in a final investigation more financial data could be collected. While this is possible, the fundamental problems remain. To require a company to recalculate its financials to a different fiscal year, for example, for the specific purpose of responding to our questions is both burdensome and counterproductive as it introduces an unacceptable amount of subjectivity into the data.

32 It must be noted, for example, that even without the opening of the new facilities, the closing of one of that company's other facilities, reflected in its fiscal 1984 financial data, contributed to a decrease in the cost of goods sold margin by some *** percent.

The Need for Further Information

Finally, the last issue which must be considered in the context of a preliminary decision is what additional data might be collected if the investigation is continued and what effect such additional data might have on the decision of the Commission. First, to say that the additional information might raise a reasonable indication of injury is obviously the wrong standard. If the investigation were continued and it showed a reasonable indication of threat, the result would be unchanged because after a final investigation the standard applied would be one of actual threat not a reasonable indication of threat.

For purposes of this decision, I assume that a consideration of the Section 771(7)(F) factors leads to the conclusion that future imports are likely to have an adverse effect on the industry. Additional information would either refute that conclusion, thus weakening even further any threat case, or, more likely, be merely cumulative of that conclusion. The question is whether additional data on the condition of the industry is likely to change that part of the threat equation thus making the import trends more "threatening". In other words, the issue in this investigation is whether there is a likelihood that additional information would so alter the picture of the condition of the industry that actual material injury, which may eventually result from the imports, is more "real" and "imminent."

I must conclude that there is no likelihood that this will occur. To be sure additional data would begin to show the operations of the new facilities of the one company. But the purpose of looking at the additional information is not to determine whether an additional six months of operation will show new and different trends in the operation of the companies involved. New and additional data will not change the fact that the significance of one company's data is compromised by exogenous factors. I do not believe that an additional investigation can cure these defects. I have therefore made a negative determination.

Dissenting Views of Commissioner Eckes

The Court of International Trade has ordered the Commission to reconsider the issue of whether there is reasonable indication that the 12-volt-motorcycle-battery industry in the United States is threatened with material injury by reason of allegedly less than fair value (LTFV) imports from Taiwan. The remand does not apply to the Commission's related finding of no reasonable indication of material injury to the same industry.

At the direction of the Court I have carefully reviewed de novo the agency record and analyzed the facts in accordance with the specific threat of material injury guidance provided by Congress in the Trade and Tariff Act of 1984. 1/ Because it is my understanding that the Commission must take into account evolving case law, as well as applicable statutory provisions, I also have reconsidered the original negative preliminary determination in terms of the Federal Circuit's decision in American Lamb. 2/

Consequently, I respectfully disagree with my three colleagues in the Commission majority who have elected to reaffirm the Commission's unanimous negative preliminary determination in 1985. On the basis of the record in this

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1/ The Commission is required to make a good faith effort to reexamine these factors without a conscious commitment to its prior determination. See USX Corp. v. United States, Slip op. 87-66 (June 3, 1987) at 11.

2/ American Lamb Co. v. United States, 785 F.2d 994, (Fed. Cir. 1986).

Investigation No. 731-TA-238 (Preliminary), I must determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of alleged LTFV imports of 12-volt motorcycle batteries from Taiwan.

From my perspective, the Commission as a matter of law is required to continue this investigation. The available record does not contain clear and convincing evidence that there is no threat of material injury, and it is likely that additional evidence will emerge in a final investigation to support appellant's point of view. Indeed, for each of the statutory factors the Court has directed the Commission to reconsider, the record of this investigation supports at the preliminary stage a threat determination, if the rule of American Lamb is followed. 3/

In the period between the time the Commission rendered its preliminary negative determination in 1985 and the Court of International Trade's remand this year, the Court of Appeals for the Federal Circuit (hereinafter CAFC) issued an important decision, clarifying the "reasonable indication" language for preliminary determinations. That opinion in American Lamb contains explicit directions to the Commission with respect to what standard it must apply in making a preliminary negative determination. The CAFC stated:

> Since the enactment of the 1974 Act, ITC has consistently viewed the statutory "reasonable indication" standard as one requiring that it issue a negative determination, as above

3/ Product shifting is not an issue in this investigation. See discussion infra.

> indicated, only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation. That view, involving a process of weighing the evidence but under guidelines requiring clear and convincing evidence of "no reasonable indication," and no likelihood of later contrary evidence, provides fully adequate protection against unwarranted terminations. Indeed, those guidelines weight the scales in favor of affirmative and against negative determinations. Under the appropriate standard of judicial review, ITC's longstanding practice must be viewed as permissible within the statutory framework. 4/

It is clear, then, from the perspective of our reviewing court that the Commission cannot terminate a petition unless the record "as a whole contains clear and convincing evidence that there is no material injury or threat of such injury." [emphasis added] And, the Commission cannot terminate an investigation if there is any likelihood "that contrary evidence will arise in a final investigation."

The American Lamb standard, which I understand to be the relevant case law, will now be applied to each of the specific criteria identified in the Court's remand. These are:

> A) any increase in production capacity or existing unused capacity in Taiwan likely to result in a significant increase in imports of 12-volt motorcycle batteries to the U.S.;
>
> B) any rapid increase in U.S. market penetration and the likelihood that the penetration will increase to an injurious level;
>
> C) the probability that imports of 12-volt motorcycle batteries will enter the U.S. at prices that will have a depressing or suppressing effect on domestic prices;
>
> D) any substantial increase in inventories of 12-volt batteries in the U.S.;

4/ Id. at 1001.

E) the presence of underutilized capacity for producing 12-volt batteries in Taiwan;

F) any other demonstrable adverse trends that indicate the probability that the importation of 12-volt batteries will be the cause of actual injury; and

G) the potential for product-shifting.

First, with respect to production capacity, the existing record does not contain clear and convincing evidence that there is no threat of material injury. Taiwan's production capacity increased from 1.5 million units in 1986 to 1.7 million units in 1983 and then jumped to 2.1 million units in 1984. 5/ During the same period capacity utilization generally declined: from 68.2 percent in 1982, it rose to 70.6 percent in 1983 and then dropped to 60.3 percent in 1984. 6/ In conjunction with Taiwan's rising capacity, one must consider the fact that this capacity was created largely to serve one market -- the United States market. In 1982 Taiwan sent 72.5 percent of its total 12-volt motorcycle battery exports to the United States. This figure increased to 74.4 percent in 1983, and then dropped slightly to 72.9 percent in 1984. 7/ In short, the record shows that Taiwan is increasing production capacity, that Taiwan has underutilized capacity, and that Taiwan directs nearly three-quarters of its motorcycle battery exports to the U.S. market. In these circumstances, a review of the record in conjunction with application of the American Lamb standard compels me to conclude that there is indeed some

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5/ Office of Investigations Memorandum in Investigation No. 731-TA-238(P), Inv-I-035, to the Commission dated February 20, 1985 (hereinafter Inv. Memorandum).
6/ Id.
7/ Id.

likelihood that Taiwan can increase significantly its shipments of 12-volt motorcycle batteries to the U.S. market.

Second, with respect to market penetration, the existing record does not contain clear and convincing evidence that there is no threat of injury. Market penetration of 12-volt batteries from Taiwan increased from a significant percentage in 1982 to an even higher level of apparent U.S. consumption in 1983. 8/ In 1984, Taiwanese batteries continued to capture an increasing share of the U.S. market. In short, over three years, the import market share has climbed seven percentage points.

The question of whether market penetration will increase to an injurious level is one that the Commission must address on a case-by-case basis. In my view, one can not select an arbitrary figure as a measure for injurious market share. In this investigation, one of the two domestic firms composing the industry clearly has been "experiencing difficulties." It seems reasonable to conclude in the course of a preliminary investigation that the rapidly increasing market share demonstrated above may well reach injurious levels.

Third, with respect to the probability that imports of 12-volt motorcycle batteries will suppress or depress domestic prices, the existing record does not enable me to conclude that there is convincing evidence of no threat of material injury.

8/ Commission Investigation Report in Investigation No. 731-TA-238(P) (hereinafter Report) at A-28. Much of the data in this investigation are confidential and therefore may only be discussed in general terms.

On the contrary, Taiwanese 12-volt batteries entered the U.S. at prices below the domestic producers' weighted average prices throughout the period of investigation. While prices of both the imported and domestic merchandise fluctuated, Taiwanese batteries undersold the domestic product in seven of eight quarters where prices of similar models were compared, and five of eight quarters for the second comparative model. 9/ Moreover, importers' prices declined more rapidly than domestic producers' prices in 1984, resulting in underselling in all four quarters of that year for both models. 10/ This consistent underselling indicates a probability that the imported merchandise would have a depressing effect on domestic prices.

Fourth, with regard to any substantial increase in inventories, the existing record does not permit me to conclude that there is convincing evidence that there is no threat of material injury. Indeed, inventories in the U.S. decreased during the period of investigation for domestic producers by 41 percent 11/ but increased for importers by 71 percent. 12/ In absolute terms, these percentages represent a significant difference in merchandise units. (Domestic producers' inventories far outnumber importers' inventories of 12-volt motorcycle batteries.) Regardless of the difference in absolute numbers, however, a 70 percent increase in importers'

9/ Id. at A-30-31.
10/ Id. at A-29.
11/ Id. at A-13.
12/ Id. At A-24.

inventories suggests that Taiwanese importers may have a strong incentive to increase sales of allegedly LTFV merchandise to lighten inventory load.

Fifth, the presence of considerable underutilized capacity in Taiwan does not enable me to conclude that there is clear and convincing evidence that there is no threat of material injury. As noted earlier, Taiwanese capacity utilization for 12-volt batteries was 57.6 percent in 1982, 64.4 percent in 1983 and decreased to 60.3 percent in 1984. 13/ Thus, in 1984 nearly 40 percent of the 12-volt motorcycle battery production facilities in Taiwan were idle.

Sixth, the presence of other adverse trends that may indicate the probability that imports of 12-volt batteries will be the cause of actual injury does not permit me to terminate this investigation, when applying the American Lamb standard. One such adverse trend is found in evidence the Commission collected on sales lost to allegedly LTFV imports. The domestic industry alleged lost sales of a substantial number of units and revenue to imports from Taiwan. These losses allegedly resulted from the loss of major customers and price reductions to the domestic industry's customers to meet the price of the subject imports. The Commission staff confirmed a number of these allegations. Indeed, the companies contacted acknowledged that lower prices on Taiwanese imports were a factor in their purchasing decisions. 14/

13/ Inv. Memorandum.
14/ Report at A-33-34.

Along with lost sales the Commission report identifies another adverse trend, lost revenues. Commission staff confirmed that the domestic industry had to lower its price to a major customer because of a Taiwanese manufacturer's low-priced offer. 15/ Once again, when the American Lamb standard is applied to the evidence at hand, the record does not permit this Commissioner to conclude that there is clear and convincing evidence demonstrating no threat of material injury.

Finally, the potential for product shifting is not an issue in this investigation. There are no pending investigations or outstanding antidumping or countervailing duty orders on products imported from Taiwan which are likely to result in a shift of production from such products into production of 12-volt motorcycle batteries.

The CAFC determination in American Lamb raises a second set of concerns in this investigation. To reach a negative determination the Commission must show that no likelihood exists that contrary evidence will arise in a final investigation to benefit petitioner's position. 16/ In light of this standard I have reviewed the record carefully to determine what additional information might be developed in a final investigation. In my judgment, a substantial amount of new information might emerge -- especially relating to threat

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15/ Id. at A-34.

16/ Although the Commission may never have all of the information that it would like in an investigation, we are required to utilize the best information available in making our determinations.

of material injury -- which could affect in a significant way the disposition of this case.

For example, as part of the 45-day preliminary investigation the Commission requested information projecting Taiwanese production, capacity, capacity utilization, total exports and exports to the U.S for 1985. Much of this information was unavailable on shcrt notice, and what data the Commission did receive appeared too tenuous and incomplete to serve as the basis for a definitive negative determination which conforms with legislative and judicial standards.

Production projections were provided by five of only seven firms that complied with the Commission's request for 1985 data. This slight response indicated that production estimates were substantially higher than 1984 figures. Three of these same seven firms failed to offer 1985 projections for annual capacity. Of the four that complied, capacity was estimated to be much greater than actual 1984 figures.

Capacity utilization projections for 1985 can be derived from the information available but these figures are illustrative of the difficulty in placing much faith in these preliminary data. Once again, only four of the seven reporting firms submitted information on capacity utilization. One of these firms estimated its 1985 production level to be ten times greater than its estimated 1985 capacity. The remaining firms projected that their 1985 capacity utilization would remain approximately the same when compared with actual 1984 figures.

Similar problems exist with respect to projections for 1985 Taiwanese total exports and exports to the U.S. The data are

scant and the numbers raise more questions than answers in a 45 day investigation. Generally, projections for future exports to the U.S. are down and exports to other countries are up when compared to their respective 1984 counterparts. 17/

Also, pursuant to statutory requirements, the Commission sought data on importers' inventories and received information showing that these inventories had increased 71 percent over the period of the investigation. However, the data base was thin. During the time frame of the preliminary investigation the Commission obtained this information from firms accounting for only 24 percent of imports from Taiwan in 1984.

Finally, the Commission developed inadequate pricing information in the alloted 45 days. The data actually received came from the same six firms that supplied data on importers' inventories. In short, the Commission gathered pricing information from firms accounting for less than 25 percent of Taiwanese imports into the United States. Clearly, in a final investigation the parties would have more time to meet the Commission's requests for data, and the Commission would have more time to analyze this information.

Let me close with this thought. From my vantage point, there is a single critical issue before the Commission in this remand: In light of the CAFC's determination in American Lamb can the Commission lawfully terminate this motorcycle battery investigation? Based on my review of the record, I think the

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17/ U.S. Department of State cable in response to USITC Investigation on 12-volt motorcycle batteries received on the night of February 19, 1985.

Commission has found no "clear and convincing evidence that there is no . . . threat of [material] injury. . . ." Moreover, because of gaps in the record the Commission cannot say that "no likelihood exists that contrary evidence will arise in a final investigation."

As a consequence, I have no choice but to render an affirmative determination that there is a reasonable indication that domestic producers of 12-volt motorcycle batteries are being threatened with material injury from allegedly LTFV imports from Taiwan.

Dissenting Views of Commissioner Lodwick

12-Volt Motorcycle Batteries from Taiwan
Inv. 731-TA-238(P)(Remand)

In 12-Volt Motorcycle Batteries from Taiwan, Inv. No. 731-TA-238, USITC Pub. No. 1654 (1985), the five Commissioners then serving on the U.S. International Trade Commission (ITC, Commission) unanimously determined, inter alia, "that there is no reasonable indication that an industry in the United States is...threatened with material injury...by reason of imports from Taiwan of 12-volt motorcycle batteries...which are alleged to be sold in the United States at less than fair value (LTFV)."[1/]

The Court of International Trade in Yuasa-General Battery Corp. et al. v. USITC et al., Ct. No. 85-04-00483 (Ct. Int'l Trade May 22, 1987), while affirming the Commission's other determinations in the cited investigation, concluded: (1) that the ITC's no-threat determination was arbitrary and capricious and an abuse of its discretion within the meaning of 19 U.S.C. section 1516a(b) (1) (A); (2, that the ITC's failure to consider all of the seven relevant economic factors in 19 U.S.C. section 1677(7)(F)(i) was not in accordance with law within the meaning of 19 U.S.C. section 1516a(b)(1)(A). In view of those conclusions , the Court remanded the matter to the ITC "for reconsideration of the issue of whether there is reasonable indication that the 12-volt-motorcycle-battery industry in the United States is threatened with material injury by reason of imports from Taiwan;..."[2/]

The remand requires the Commission to "...consider the matter anew. Neither its prior conclusion or the interest of the party prevailing upon judicial review governs the outcome..."[3/] What is required is "...a good faith effort to reexamine the relevant issue without a conscious commitment to a prior determination of the same factual question."[4/]

In ordering this remand the Court has directed the Commission to consider "all of [the relevant economic factors in 19 U.S.C. section 1677(7)(F)(i), i.e., (II) through (VIII)], at a minimum."[5/]

Furthermore, the Court's dissection of the relevant portion of the "Views of the Commission" [6] and the parcelling out of the resulting pieces among the economic factors, together with the Court's notation of the specific factors which the Commission failed to consider, makes evident: (1) the Court's intent to have the Commission consider each of the relevant statutory economic factors individually; (2) the Court's expectation that the Commission, in framing its determination, will take care to correlate the articulation of its analysis with the respective factors.

I have, therefore, considered the remanded issue de novo and seriatim per 19 U.S.C. section 1677(7)(F)(i)(II)-(VIII), and determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of allegedly less-than-fair-value 12-volt motorcycle batteries from Taiwan. [7] [8]

The seven relevant economic factors of 19 U.S.C. section 1677(7)(F)(i), adapted to the particulars of this investigation, are:

1. Taiwanese production capacity: any increase in production capacity or existing unused capacity in Taiwan likely to result in a significant increase in imports of 12-volt motorcycle batteries to the U.S.

2. U.S. market penetration: any rapid increase in U.S. market penetration and the likelihood that the penetration will increase to an injurious level.

3. Prices: the probability that Taiwanese 12-volt motorcycle batteries will enter the U.S. at prices that will have a depressing or suppressing effect on U.S. prices.

4. Inventories: any substantial increase in inventories of 12-volt motorcycle batteries in the U.S.

5. Taiwanese production capacity: the presence of underutilized capacity for producing 12-volt motorcycle batteries in Taiwan.

6. Other adverse trends: any other demonstrable adverse trends that indicate the probability that the importation of Taiwanese 12-volt motorcycle batteries will be the cause of actual injury .

7. Product shifting: the potential for product shifting if Taiwanese production facilities, which can be used to produce certain other products, are also used to produce 12-volt motorcycle batteries.

Analysis of the record data pertaining to each of the seven factors follows.

1. Taiwanese production capacity.

The information on Taiwanese capacity came by State Department cable late in the investigation.[9/] The cable reported partial data which had been provided for seven companies. Data for 1982 and 1983 showed capacity for each of only five of the seven companies. Data for 1984 showed the capacity of each of the seven companies. However, the cable information also showed production for all seven companies during each of the years 1982-84.

Taiwanese capacity appeared to be increasing during the period of the investigation. The cable data for just the five companies reporting capacity figures throughout 1982-1984 showed a moderate increase over the period.[10/] The capacity figures for the two other firms add an additional substantial increase to the total for 1984.[11/]

While this is the best available information on increases in Taiwanese capacity, and the Commission is required to act on that, the significance of that information may be questioned because both of the domestic producers imported 12-volt motorcycle batteries from Taiwan during the period of investigation.[12/] While the incomplete capacity data on Taiwanese producers and the relationships between domestic and Taiwanese producers tend to derogate from the otherwise apparent significance of the increase in capacity, it in no way diminishes what is probably the more significant aspect of the data as it pertains to the issue of threat: the magnitude of the capacity which existed at the point where threat is to be assessed, i.e., at the end of the investigative period, 1984.

The best available information is that Taiwanese capacity in 1984 was 2,130,000.[13/] Of that capacity, 39.7 percent,[14/] representing 845,610 units, was not being utilized. That unused capacity represents 173% of exports to the U.S. in 1984.

In addition, production for the seven firms increased 25% during 1982-1984. Exports to the U.S. accounted for a large and generally stable share of this production, with the ratio of exports to the U.S. to Taiwanese production ranging from 37% to 40% during 1982-1984, 38% in 1984.

To summarize, Taiwanese capacity appears to have been increasing, production was increasing, exports to the U.S. accounted for a large and stable share of production, and considerable available capacity continued to exist. These points, taken together, support the existence of threat.

2. U.S. market penetration.

Three elements provide the material for assessing threat to the U.S. industry in this investigation in terms of market penetration.

First, the U.S. market for 12-volt motorcycle batteries expanded during the investigative period. In 1983 the U.S. market increased 28.9% over 1982, and in 1984 15.3% over 1983, for a total increase from 1982 to 1984 of 48.7%.

Second, the market share of the U.S. producers declined roughly 30% from 1982 to 1984.

Third, the market share of Taiwanese imports increased roughly 60% from 1982 to 1984.

In sum then, the picture shows Taiwanese imports taking annually increasing shares of growing markets while the market share of U.S. producers is annually diminishing. Market shares and what they portend for the U.S. industry thus appear as a significant factor in assessing threat in this investigation.

As noted, the U.S. producers are also importers of Taiwanese 12-volt motorcycle batteries. The market share of the U.S. producers' Taiwanese imports increased approximately 25% over the investigative period. While this may detract from the weight which might otherwise be accorded to the Taiwanese-imports market shares, the rate of increase at which 12-volt motorcycle batteries were imported from Taiwan by "other importers" over the period of investigation as shown by market shares was nearly three times that of the U.S. producers, and these "other producers" started with a substantially larger market share in 1982. In short, the significance of the increasing market penetration of Taiwanese imports persists in the assessment of threat to the U.S. industry.

3. Prices

Price data on two popular models was compiled as representative of 12-volt motorcycle batteries. Price trends were not persistent over the investigative period, but prices generally declined during 1983 and 1984. These drops in prices were substantial. While prices were precipitously dropping, the data shows underselling by Taiwanese imports in some quarters of 1983 and in all quarters of 1984. The underselling by Taiwanese imports at its higher levels was substantial and moderated from quarter to quarter in 1984.[15]

In addition to what can be construed relevant to threat directly from this price data, there is evidence in the record that the then-recent Taiwanese import prices demonstrated a capacity for injuring the U.S. industry in the near term. Yuasa-General claimed that it had lost sales and annualized revenue[16] during the 1982-84 period largely as the result of losing to Taiwanese imports four firms which had been major customers, and price reductions made to meet the lower prices of those imports.[17] Two of the firms confirmed that they had recently changed suppliers from Yuasa-General to 12-volt motorcycle batteries from Taiwan, and cited lower price, and better service, as reasons. This preliminary investigation record contains no data on the volumes of purchases by these former customers.

A representative of another firm stated that the company currently buys 12-volt motorcycle batteries from Taiwan but did not know if the firm had recently switched suppliers. Presumably, that, and other information relative to assessing the further significance of these claimed losses would be available in a final investigation, as would additional information and clarification of Yuasa-General's claims regarding lost revenues.[18]

4. Inventories.[19]

The data on importers' inventories was obtained from six firms that account for only 24.1% of the 12-volt motorcycle batteries imported from Taiwan in 1984.[20] Therefore, no direct comparisons can be made with the more complete data on imports, consumption, etc., but the increase shown by the data from these six firms is instructive and does make some contribution to the finding that the U.S. industry was threatened. From 24,558 units

in 1982, the importers' inventories increased in 1983 by 27.7% and in 1984 by 33.8%, for an increase over the investigative period, 1982-1984, of 70.8%.[21] While the absolute numbers represented by these percentages are not large compared with the size of the U.S. market, the trend demonstrated is compatible with and contributes to the other factors showing threat.

5. Taiwanese production capacity.

This factor was discussed under item 1. above.

6. Other adverse trends.

As noted by the Court,[22] the Commission in its views observed that the available financial information indicated that Exide, one of the two producers comprising the U.S. industry, was "experiencing difficulties."[23]

The Court's point is well taken, that, in an industry comprising two producers, one producer's difficulties can be a significant consideration in assessing whether imports pose a threat of material injury to the industry. (The fact that Exide's then-existing difficulties had not been caused by Taiwanese imports does not preclude consideration of Exide's condition in analyzing the threat issue. In analyzing threat, you "take 'em as you find 'em.") A person in poor condition being more susceptible to disease, so a domestic producer experiencing difficulties is more in risk of experiencing material injury as a result of imports.

Four considerations here contribute to the conclusions that threat exists in this preliminary investigation and that a final investigation is required. First is the environment (comprising the points discussed above concerning capacity, imports, market shares, etc.) which existed at the close of 1984. Second, Exide was "experiencing difficulties." Third, Exide is not an insignificant part of the U.S. industry in capacity or production.[24] Fourth, income-and-loss data for Exide for 1984 were incomplete.[25]

7. Product shifting.

There are no on-going investigations or outstanding anti-dumping or countervailing duty orders on products imported from Taiwa.. which are likely to result in a shift of production from such products into production of 12-volt motorcycle batteries.

Having examined the record in this preliminary investigation in terms of all the relevant economic factors, including the seven relevant factors set forth in 19 U.S.C. section 1677(7)(F)(i), I determine in accordance with the requirements of 19 U.S.C. section 1672b(a) and American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986), respectively, that: there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of allegedly less-than-fair-value 12-volt motorcycle batteries from Taiwan; the threat of material injury is real and actual injury is imminent; the record as a whole does not contain clear and convincing evidence that there is no threat of material injury; the record as a whole does not support a determination that no likelihood exists that contrary evidence will arise in a final investigation.

1/ USITC Pub. 1654 (Feb. 1985) [hereinafter cited as "Pub. 1654"] at 1,3.

2/ Slip op. 87-60 at 17-18.

3/ USX Corp. v. United States, Slip op. 87-66 (June 1, 1987) at 11 (citations omitted).

4/ Id.

5/ Slip op. 87-60 at 17.

6/ Pub. 1654 at 11-12; quoted in haec verba, Slip op.87-60 at 10.

7/ 19 U.S.C. section 1673b(a).

8/ The Court having affirmed the Commission's determinations of the other issues in the investigation, including the determination of no reasonable indication of material injury, I, of course, have not considered de novo any of those issues.

9/ Most of the cable data is summarized in Pub. 1654 at A-17, text and Table 9. Data as to the individual companies is confidential. ConfDoc 13 of List No. 2 of the Administrative Record.

10/ Of the five companies which did provide capacity data for each of the three years of the investigative period, two reported increases in capacity.

11/ The information on capacity is not complete nor is it the best that could be expected to be available in a final investigation. The State Department cable notes that data for one named company (the magnitude of which is unknown) had not been submitted, nor had the Taiwan Electric Appliances Manufacturers' Association (which had compiled the data reported in the cable) yet submitted the promised information for "the industry as a whole."

12/ The two domestic producers import 12-volt motorcycle batteries from two of the Taiwanese producers which provided capacity data for each of the three years of the investigative period.

13/ Pub. 1654 at A-17. This is the total for the seven companies which provided the data compiled in the State Department cable. In fact, capacity may have been greater. See 11/ supra.

14/ Reciprocal of 60.3% capacity utilization. Pub. 1654 at A-17.

15/ ConfDoc 12 at A-30-31, Tables 12, 13.

16/ ConfDoc 12 at A-33; Pub 1654 at A-25.

17/ One firm reported that it no longer deals in motorcycle batteries.

18/ ConfDoc 12 at A-34; Pub. 1654 at A-26.

19/ This factor does not specify what inventories are to be considered: importers, domestic producers, or both. While the condition of domestic producers' inventories could indicate threat, they are not probative in this investigation in view of the decline annually in absolute terms and as shares of their shipments. ConfDoc 12 at A-13; Pub. 1654 at A-9.

20/ Pub. 1654 at A-17.

21/ Pub. 1654 at A-17.

22/ Slip op. 87-60 at 16.

23/ This observation was made by the Commission in the course of its general discussion of the U.S. industy. Further on, in the course of discussing material injury, the Commission stated its conclusion that Exide's difficulties were due to factors other than Taiwanese imports. Still further on, in its discussion of the threat issue, the Commission made a general reference to "the condition of the domestic industry" and stated that the "trend of the industry's performance is positive." No mention was here made of Exide's "difficulties." Pub. 1654 at 9, 10, 12.

24/ ConfDoc 12 at A-11, Table 3.

25/ Exide had provided income-and-loss data for only the first three months of 1984, i.e., to the end of its then newly-adopted accounting year, March 31, 1984, Exide's data to December 31, 1984, was requested but had not been received. Pub. 1654 at A-11.